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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 65

TIMOTHY F. LEARY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals affirming the judgment of the district court is reported at 383 F. 2d 851. The opinion denying a petition for rehearing and rehearing *en banc* is reported at 392 F. 2d 220.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1967. A petition for rehearing or rehearing *en banc* was denied on March 29, 1968. The petition for a writ of certiorari was filed on April 27, 1968. Certiorari was granted June 10, 1968, limited to the two questions listed below. 392 U.S. 903. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the provision of the Marihuana Tax Act (26 U.S.C. 4744(a)(2)) prohibiting the transportation or concealment of marihuana by a person who acquired the drug without paying the transfer tax (26 U.S.C. 4741(a)(2)) violates petitioner's privilege against self-incrimination when the Act is administered and applied so as not to permit prepayment of the tax by those whose handling of marihuana would otherwise be unlawful.

2. Whether, in the circumstances of this case, petitioner was denied due process by the application of the provision of 21 U.S.C. 176a, that proof of possession of marihuana may be sufficient evidence to authorize conviction for facilitating the transportation of illegally imported marihuana, with knowledge of its illegal importation.

STATUTES AND RULES INVOLVED

The relevant statutes and rules (26 U.S.C. 4741–4744, 4751–4753, 4771, 4773, 4775, 6107, 7237(e); 26 C.F.R. 152.19–152.20, 152.22–152.23, 152.30–152.36, 152.61–152.68, 152.105, 152.131) are set forth in the Appendix, *infra*, pp. 47–60).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas petitioner was convicted of transporting and concealing fraudulently imported and non-tax-paid marihuana in viola-

tion of 21 U.S.C. 176a and 26 U.S.C. 4744(a)(2).[1] On March 11, 1966, pursuant to 18 U.S.C. 4208(b), he was tentatively sentenced to the maximum punishment, pending completion of a study and recommendation to be used by the court in determining the ultimate sentence. The court of appeals affirmed, 383 F. 2d 851, and denied a petition for rehearing and rehearing *en banc*. 392 F. 2d 220.

The government's evidence showed that at approximately 6:45 p.m. on December 22, 1965, petitioner and four others arrived at the secondary inspection area, Laredo International Bridge, Laredo, Texas. When a customs inspector asked him to unload the baggage, petitioner stated that the five occupants had earlier crossed the bridge to the Mexican Inspection Station, but had been denied permission to enter Mexico until the following morning. After the three male and two female occupants stepped out of the automobile, the inspector noticed what appeared to be marihuana seeds on the floor of the car (App. 62–65). A personal search was then conducted of the five occupants (App. 65–69, 72–74). In the course of a search by a female customs inspector, petitioner's daughter was found to have in her possession a silver snuff box containing semi-refined marihuana and three partially smoked marihuana cigarettes (App. 73–74, 80–81). A search of the automobile revealed addi-

[1] Petitioner's daughter, Susan, who waived jury trial, was convicted of transporting non-tax-paid marihuana (26 U.S.C. 4744(a)(2)), and was sentenced under the provisions of the Youth Corrections Act. Her appeal from that conviction was dismissed on her own motion.

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tional sweepings of marihuana in the glove compartment of the car and on the front and rear floor boards (App. 68–69, 81).[2] All five occupants were then placed under arrest (App. 70–71). Petitioner again declared that he and his party had been denied permission to enter Mexico (App. 75), but admitted to an inspector that the snuff box was his, that he had given it to his daughter on the Laredo Bridge and told her to get rid of it, and that he had been aware as they crossed into the United States that his daughter still had the marihuana in her possession (App. 74–75, 76, 77–80).[3]

Petitioner testified at trial that he had purchased the marihuana in New York, prior to the trip to Mexico (App. 83, 89–91), and that he had not realized that on their return the car would have to be cleared through American customs and did not learn that his daughter had not gotten rid of "all of the marihuana" until they crossed the border and approached the U.S. Customs shed (App. 84–86). He conceded that "I knew this at all times, that to bring marihuana into the United States was against the law" (App. 90). He also testified that he did not attempt to obtain the order form required by 26 U.S.C. 4742 or pay the tax imposed by Section 4741(a)(2) since he knew that he "couldn't get such a permission * * * because I don't

[2] The weight of the three cigarettes was estimated to be .15 gram; the loose marihuana in the box weighed approximately 11.11 grams (App. 81–83).

[3] Neither petitioner nor his daughter produced, on request, the Treasury order form required to be retained by a transferee of marihuana (App. 74–75).

do research in a laboratory and because I use them [marihuana and other regulated drugs] for religious purposes, and there is no provision in the law for doing it" (App. 86–87).[4] He also explained that he did not believe he was obliged to pay the tax because it conflicted with "the Fifth Freedom"—"the freedom of a man to pursue his inner goals and to expand his own consciousness" (App. 87–88)—and thus constituted an unwarranted infringement upon his freedom of religion (App. 89–90).

SUMMARY OF ARGUMENT

I

A. Petitioner assails his conviction for having acquired and transported marihuana without paying the $100 per ounce transfer tax imposed by the Marihuana Tax Act, on the ground that if he had applied for the order form (a step necessary to payment of the tax), and paid the tax, he would have disclosed incriminatory information. Relying on the recent *Marchetti, Grosso,* and *Haynes* decisions, he contends that the Act unconstitutionally sought to compel self-incrimination. The Marihuana Tax Act, however, has consistently been construed and applied by the Internal Revenue Service and Bureau of Narcotics as precluding acquisitions of order forms and pre-payment of the $100 transfer tax by persons—like peti-

[4] Petitioner also testified: "It's well known that many people have tried to obtain marihuana for research and religious purposes and have not been able to get it" (App. 87). He stated that he himself had unsuccessfully applied for authority to obtain other dangerous drugs (App. 88).

tioner— who are not registered under the Act, and who cannot register because their handling of marihuana would be in violation of state law. The Act does not compel or contemplate disclosures by those whose activities would violate state law. As to such persons, ineligibility to comply with the transfer provisions of the Act constitutes a complete prohibition on handling marihuana. This construction of the Act, which was known to petitioner, is based on Congress' expressed intent to tax and publicize legitimate industrial, medical, and scientific dealings in marihuana on the one hand, and to eliminate completely—through the imposition of prohibitive tax mechanisms—all clandestine and illicit acquisitions for smoking purposes on the other.

B. Since, as petitioner knew, the Internal Revenue Service and Bureau of Narcotics will not accept the submission of applications for order forms and pre-payment of the tax from persons who are not lawfully registered, the provisions of the Marihuana Tax Act under which petitioner was indicted and convicted do not pose "substantial" risks of incrimination. Petitioner was not "compelled" to make incriminatory disclosures by applying for an order form and tendering the transfer tax since, as he testified he had been aware at the time he purchased the marihuana, the administrative agencies will not issue order forms to, or accept pre-payment of the transfer tax from, those persons, like him, who are not registered or registrable. In short, as petitioner realized, the statute simply proscribes a course of

conduct—the acquisition of marihuana by unregistered persons—and in no way compels or even expects or recognizes any attempts to furnish incriminating information. His conviction for violating the ban on handling marihuana does not violate his privilege against self-incrimination.

C. Petitioner's other challenges to the Marihuana Tax Act, so construed, are insubstantial. Although the enforcement agencies will not accept pre-payment of the transfer tax from unregistered persons, it does not follow that the government is estopped from indicting and convicting those who acquire and transport marihuana in violation of the Act. As the legislative history shows, Congress intended—through the imposition of the prohibitive $100 per ounce transfer tax—to curb completely all dealings in marihuana by those persons who could not properly deal in marihuana. Congress may validly decide who can and who cannot qualify to handle a regulated commodity and may punish those who, without the necessary authority or qualifications, nevertheless acquire or transport it.

Permitting an inference from a possessor's failure to produce an order form that a sale of marihuana was made without payment of the tax which is a prerequisite to obtaining the form does not violate due process simply because the government will not issue such forms to unregistered persons. The inference is clearly fair and reasonable in light of common experience. It is no different from an assumption that a driver who is unable to produce an operator's license is not licensed. It would certainly be no defense to

a prosecution for operating a motor vehicle without a license, in such a situation, that the driver was unable to obtain a license because of some physical infirmity which rendered him unqualified. In any event, petitioner testified that he did not pay the tax or obtain an order form.

Although the government will not accept pre-payment of the transfer tax, non-payment of the tax constitutes a statutory element of the crime. The trial court thus properly charged that proof of non-payment was material to the government's case.

Petitioner was adequately warned by the statute that the acquisition and transportation of marihuana without payment of the tax was the predicate of criminal liability. He testified at trial that he knew that the government will not issue order forms to, or accept pre-payment of the transfer tax from, persons, like him, who are not registered. He also testified that he knew that the acquisition and transportation of marihuana without such payment was in violation of the law. His claim of lack of notice, therefore, is insubstantial.

II

A. In the circumstances, the trial court did not commit reversible error in instructing the jury—with respect to the alleged violation of 21 U.S.C. 176a—that unlawful importation and knowledge thereof could be inferred from the proof of possession of marihuana in this country. At trial, petitioner testified that he had purchased the marihuana in New York, transported it to Mexico, and then back into this coun-

try without any declaration at the American customs station. He thus admitted each and every element necessary for conviction under 21 U.S.C. 176a. Although the trial court added an instruction on an alternative theory of guilt that unlawful importation and knowledge thereof could be inferred from possession, petitioner did not object to this instruction. In these circumstances, he cannot now complain that it is impossible to determine which theory the jury accepted in finding him guilty.

B. In any event, the statutory inference is valid. There is a rational connection between the fact of possession of marihuana in this country and the inference that the marihuana was, as known by the possessor, imported contrary to law. When Congress enacted the statute (21 U.S.C. 176a) in 1956, it had before it evidence that, as a result of the strict enforcement of laws against the domestic growth of marihuana, and in light of the relative impotency of the domestic marihuana plant, some 90% of all smoking marihuana used in this country was of foreign origin. Although marihuana can be and is grown domestically, we have found no new evidence which would indicate any decrease in this figure. Indeed, subsequent evidence confirms that state and local laws against growing marihuana are still rigidly enforced, and that the typical marihuana user still clamors for the Mexican variety rather than that grown domestically. Moreover, through the past six years, at least 79% of all seizures of marihuana effected by federal authorities are made at ports and borders of the

United States. Given the fact that overwhelming percentages of smoking marihuana found in the United States are of foreign origin, the trial court did not err in authorizing the jury to accept the statutory inference that unlawful importation and knowledge thereof could be inferred, in the absence of a satisfactory explanation, from proof of petitioner's possession.

C. The trial court did not commit reversible error in instructing the jury that the inference of unlawful importation and knowledge thereof could be negated by a showing that petitioner's possession was "lawful and legitimate". In context, it was obvious to the jury that the trial judge meant, in explaining that a "lawful and legitimate" possession would overcome the inference, that the inference would be negated if petitioner, through testimony or otherwise, successfully demonstrated that the marihuana was not unlawfully imported, or that he was unaware of such importation.

Nor was the instruction vague because the trial judge failed to explain more fully the meaning of the phrase, "unless the defendant explains his possession to the satisfaction of the jury." As we stated above, the trial judge simply meant that if petitioner offered some tenable basis for concluding that the marihuana was not imported, or that he was unaware of its importation, then they should acquit. In light of petitioner's failure to object to the instructions, or to seek the clarification which he now seeks, there is no occasion to reverse. Rule 30, F.R. Crim. P.

ARGUMENT

I. THE MARIHUANA TAX ACT, AS AUTHORITATIVELY AND CONSISTENTLY CONSTRUED AND APPLIED, DOES NOT COMPEL THE DISCLOSURE OF ANY INFORMATION WHICH COULD BE INCRIMINATORY

Count three of the indictment charged that petitioner, a transferee of marihuana "* * * required to pay the transfer tax imposed by [Section 4741(a)(2) of] the Internal Revenue Code, did unlawfully and knowingly transport, conceal and facilitate the transportation and concealment of a quantity of Marihuana, to wit: approximately three (3) ounces of Marihuana (Cannibas Sativa) without having paid the transfer tax imposed by said code, in violation of Section 4744(a)(2), Title 26, United States Code" (App. 60–61). Petitioner challenges his conviction on that count on the ground that application for and acquisition of an order form—a step necessary to payment of the transfer tax—would have incriminated him and thus that the conviction is invalid under the principles set forth in *Marchetti* v. *United States,* 390 U.S. 39; *Grosso* v. *United States,* 390 U.S. 62; and *Haynes* v. *United States,* 390 U.S. 85. As *Grosso* establishes, the validity of this defense turns on an "assessment of the hazards of incrimination which would result from 'literal and full compliance' with all the statutory requirements." 390 U.S. at 65. Thus, the initial inquiry in testing petitioner's claim must be: What was petitioner obliged to do in order to comply fully with the Marihuana Tax Act? Analysis of the statute will demonstrate, we submit, that as au-

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thoritatively interpreted by the agencies entrusted with its administration (the Internal Revenue Service and the Bureau of Narcotics[5]), this Act differs critically from those considered in the above-cited cases, and in practical effect presents no substantial risk of self-incrimination.

The major premise in the gambling and firearms cases was that the obligations under those statutes to register and pay occupational and excise taxes created a "real and appreciable" risk of incrimination. *Marchetti, supra,* 390 U.S. at 48. As the Court had said earlier in *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 79, registration provisions compelling disclosure of incriminating information contravene the Fifth Amendment when the requirements "are directed at a highly selective group inherently suspect of criminal activities." That is not this case. The essential distinction is that the disclosure requirements under the Marihuana Tax Act are directly aimed at the regulation of the *legitimate* market in marihuana, and, as drafted and applied, these provisions presuppose—and apply only to—activities which are otherwise lawful.[6] Those who cannot deal in marihuana lawfully under local law cannot obtain tax-paid order forms from the federal government,

[5] Now, the Bureau of Narcotics and Dangerous Drugs.

[6] As the Bureau of Narcotics explained in its *Report on the Traffic in Opium and Other Dangerous Drugs* for calendar year 1966, in summarizing its regulatory function (p. 9): "Controls on domestic trade in narcotic drugs directly apply to people who handle, sell, or dispense narcotics for *lawful* medical purposes; such as physicians, hospitals, pharmacists, retailers, and others" (emphasis added).

and thus, by definition, those who are permitted to comply with this Act cannot be incriminating themselves.

A. INTRODUCTION—THE PLAN OF THE STATUTE

In enacting the Marihuana Tax Act in 1937 Congress evinced a dual purpose: it intended to raise revenue through occupational and transfer taxes on the trade in marihuana while at the same time discouraging the widespread use of the drug by smokers and addicts.[7] In light of this dual purpose, Congress was careful to distinguish in its control provisions between the authorized market for marihuana and the illicit and clandestine traffic in the drug. Thus, the Senate Committee explained (S. Rep. p. 3):

> * * * the bill is designed, through the occupational tax and the order form procedure, to publicize *legitimate* dealings in marihuana and through the $100 transfer tax to prevent the drug from coming into the hands of those who will put it to illicit uses. [Emphasis added.]

The House Committee Report (H. Rep. p. 2) reflects the same design:

> [A]ll *legitimate* handlers of marihuana are required to pay occupational taxes * * *.
>
> *These* persons, in addition to paying the occupational tax, must register with the collector of internal revenue and file information returns as to their dealings in marihuana. [Emphasis added.]

[7] S. Rep. No. 900, 75th Cong., 1st Sess. 2 (1937) (hereafter "S. Rep."); H. Rep. No. 792, 75th Cong., 1st Sess. 1 (1937) (hereafter "H. Rep.").

In order to achieve this policy, the Act imposes an annual occupational tax on all persons who desire to handle marihuana legitimately (*i.e.*, import, manufacture, produce, compound, sell, dispense, prescribe, administer, or give away) (26 U.S.C. 4751; see, also 26 C.F.R. 152.19).[8] And these legitimate handlers must register with the district director of Internal Revenue (26 U.S.C. 4753; 26 C.F.R. 152.19). Registration and payment of the occupational tax must be renewed annually (26 U.S.C. 4751, 4753; 26 C.F.R. 152.20). Although petitioner, in this Court (compare App. 86–87, 88), expresses uncertainty on the matter (Br. 9–11), it is manifest that these provisions do not extend to illicit handlers like petitioner. The registration requirement imposed by 26 U.S.C. 4753 and the occupational tax requirement imposed by Section 4751 are interdependent: only those subject to the occupational tax need register. And in enumerating the classes of professionals subject to the occupational tax (and thus derivatively to the registration requirement), Section 4751 follows the enumeration of classes of individuals who, under Sections 3–7 of the Uniform Narcotic Drug Act,[9] might lawfully

[8] Contrary to petitioner's present suggestion (Br. 11, 15), the provision of Section 4751(5) is not a "catch-all" in the sense that it purports to impose the "occupational" tax on individuals who acquire or transfer marihuana for smoking or other unsanctioned purposes. As the regulations make clear, this subsection is directed at the registration of legitimate professional dealers—typically wholesale suppliers and pharmacists. See 26 C.F.R. 152.33, 152.95, 152.96. Indeed, the regulations expressly forbid itinerant vending or peddling of marihuana. 26 C.F.R. 152.38.

[9] The Uniform Act had been promulgated in 1932. See 9B Uniform Laws Ann. 409, 410.

manufacture, wholesale, dispense, prescribe, or possess marihuana.[10]

Complementing the professional occupational tax and registration is the transfer tax designed to insure that the commerce in marihuana is confined to lawful registrants. Thus, the Act imposes upon a transferee[11] a tax of $100 per ounce for any transfer of marihuana to a non-registered person (26 U.S.C. 4741(a)(2); 26 C.F.R. 152.61–152.62).[12] To effectuate this same policy, the Act further makes unlawful *any* transfer of marihuana (with irrelevant exceptions), whether to a registrant or non-registrant, unless the transfer is carried out in pursuance of a written order of the transferee on a form issued by the Secretary of the Treasury (26 U.S.C. 4742; 26 C.F.R. 152.66).[13] In order to obtain the order form, which is in turn given to his seller, the prospective transferee must submit to the district director of Internal Revenue an application (Form 679a) stating his name and address and that of the proposed transferor, a description, including the quantity, of the marihuana desired to be obtained,

[10] The regulations make it express that a person may not register unless he can satisfy the director that he is qualified under state law to conduct the business or activity for which registration is sought (26 C.F.R. 152.22–152.23).

[11] In the event that the transfer is made in violation of the Act, the transferor is jointly liable for the tax (26 U.S.C. 4741(b)).

[12] Transfers to registered persons are taxed at a rate of $1 per ounce (26 U.S.C. 4741(a)(1)).

[13] The Act exempts from the transfer tax and order form requirements certain medical, industrial, and governmental transfers. (See 26 U.S.C. 4742(b)(1)–4742(b)(5)).

and the transferee's registry number, if so registered under the applicable provisions. A money order or check to cover the amount of the transfer tax must be remitted with the application (26 U.S.C. 4741(b), 4742(c); 26 C.F.R. 152.63, 152.66). If the application is accepted by the district director, he will affix a stamp—which represents payment of the appropriate tax (26 U.S.C. 4771; 26 C.F.R. 152.63–152.64)—to the order form and send it to the transferee for use in the transaction. Section 4744(a)(1) makes it a crime for any person required to pay the transfer tax to obtain marihuana without having paid the appropriate tax. Section 4744(a)(2)—under which petitioner was convicted—similarly proscribes the transportation or concealment of non-tax-paid marihuana by a person who has failed to pay the required tax.[14]

B. THE TRANSFER PROVISIONS OF THE MARIHUANA TAX ACT HAVE BEEN ADMINISTRATIVELY CONSTRUED AS PRECLUDING THE ACQUISITION OF ORDER FORMS AND PRE-PAYMENT OF THE TRANSFER TAX BY NON-REGISTRANTS

1. Although the Act, on its face, is susceptible of a construction that would sanction sales of marihuana to non-registered persons on payment of the $100 transfer tax, the Internal Revenue Service and Bureau of Narcotics have consistently, since passage in 1937, construed the Marihuana Tax Act *in pari materia* with the Harrison Anti-Narcotic Act of

[14] Section 4744(a)(2) was added as part of the Narcotic Control Act of 1956 in order to facilitate the proof of venue. See H. Conf. Rep. No. 2546, 84th Cong., 2d Sess., p. 12; H. Rep. No. 2388, 84th Cong., 2d Sess, p. 1; S. Rep. No. 1997, 84th Cong., 2d Sess., p. 8.

1914[15] and developed a policy—concededly known to petitioner (App. 87)—of not issuing order forms to those who are not registered, and who cannot qualify for registration because their intended activities would violate state law.[16]

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[15] Under the Harrison Act, 26 U.S.C. 4705(a) provides that transfers of narcotic drugs must be made pursuant to an order form given by the transferee to the transferor. Subsections 4705(f) and (g) expressly provide that such forms will be issued only to those persons who are registered and only for use in connection with a "lawful" business or "legitimate" profession. The constitutionality of these provisions was upheld in *United States* v. *Doremus*, 249 U.S. 86; see, also, *Nigro* v. *United States*, 276 U.S. 332.

[16] The manner in which an application by a non-registrant would be handled by a district director is not clearly defined by statute or regulation. The Internal Revenue Service has advised us that, since it has no record that there has *ever* been such an application by an non-registrant, the Service has never formulated a policy in the form of a regulation or operating procedure for processing such applications. They have pointed out, however, that the only provisions for disclosure of information by district directors are those under 26 U.S.C. 4773 (authorizing the disclosure of the contents of order forms which have been issued to, and returns filed by, persons who *are* registered under the provisions of Sections 4751–4752) and under 26 U.S.C. 4775 (authorizing the disclosure of the names of those who *have* lawfully registered and paid the special occupational tax). See, also, 26 U.S.C. 6107; 26 C.F.R. 152.104, 152.105, 152.131; compare 26 U.S.C. 7237(e). Moreover, they have advised us that, since the decisions in *Marchetti*, *Grosso*, and *Haynes*, district directors have been instructed that if an application for order forms is submitted by a non-registered person, the application should be treated as confidential, and no disclosure made to any enforcement or investigative agencies either of the contents of the application or of the fact that it has been submitted. District directors have been ordered merely to return the application with an explanation to the effect that, since the applicant is not registered, he cannot qualify for an order form.

This administrative construction is reflected in the regulations jointly promulgated by the Commissioner of Narcotics and the Commissioner of Internal Revenue, and approved by the Secretary of the Treasury, in 1937.[17] Article 47 of these regulations [18] provided that applications for order forms were to be signed by the same person signing the application for registration, and Article 48 [19] provided that the signature on the application for an order form was to be compared with that on the application for registration before the application would be honored.[20] The administrative agencies have consistently construed these regulations as limiting the issuance of order forms to those who are registered.[21]

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[17] 2 Fed. Reg. 2054 (1937), now 26 C.F.R. Pt. 152.

[18] 2 Fed. Reg. 2059 (1937), now 26 C.F.R. 152.67.

[19] 2 Fed. Reg. 2059 (1937), now 26 C.F.R. 152.68.

[20] The application for an order form may be signed by a person other than the one who signed the application for registration only if a power of attorney has previously been filed with and approved by the district director. See regulations cited in notes 18–19, *supra*.

[21] In 1964, the regulatory provisions codified in 26 C.F.R. 152.22 and 152.23 were added to make explicit what had always been assumed—that only persons whose business would be lawful under state law can qualify for registration. Section 152.23 provides that the application of any person seeking registration under the Act must show that "under the laws of the jurisdiction in which he is operating or proposes to operate, he is legally qualified or lawfully entitled to engage in the activities for which registration is sought." If the applicant has not previously registered (registration must be renewed annually), his application will be referred by the district director of internal revenue for investigation by the appropriate district supervisor of the Bureau of Narcotics; the district director may not accept the tendered application unless and until the narcotics supervisor informs him "that the applicant is properly

Thus, under the Marihuana Tax Act and implementing regulations, only persons whose handling of marihuana would otherwise be lawful under state or local law are expected—and allowed—to register and pay the occupational tax. Since order forms for authorization of marihuana transactions will be issued only to registrants, only those whose intended acquisition of marihuana would be legitimate under state and local law are allowed to apply for order forms and to tender the transfer tax. Persons who, like petitioner,[22] are neither registered nor qualified to seek registration thus can comply with this Act only by *abstaining* from any involvement with marihuana.[23] As to this class, the Act stands as a direct and absolute federal prohibition against obtaining, concealing, transporting, or transferring marihuana.

2. As noted above, Congress did not use explicit terms, like those employed in the Harrison Act, to proscribe all handling of marihuana by non-registered persons. We suggest, however, that the construction

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licensed or otherwise lawfully entitled to engage in the activity in the internal revenue district in which he seeks registration." 26 C.F.R. 152.22(b).

[22] Under 26 U.S.C. 7491, in the absence of production of evidence by a defendant that he is a marihuana registrant and has complied with the order form requirements, the contrary will be presumed.

[23] Of course, this does not foreclose assessment of the transfer tax upon an unregistered transferee who goes ahead and obtains marihuana without the legal right to do so; substantial revenue is raised in this way. See, *e.g.*, *United States* v. *Sanchez*, 340 U.S. 42; *United States* v. *Guerra*, 237 F. Supp. 1 (D. Colo.), affirmed, 371 F. 2d 584 (C.A. 10) (civil assessments).

placed on the Act by the Internal Revenue Service and Bureau of Narcotics—which we believe avoids any possible conflict with the values protected by the privilege against self-incrimination—effectuates the clear congressional objective and comports with the language of the statute.

In favorably reporting the bill, both the House Committee on Ways and Means and the Senate Committee on Finance stated that the Harrison Act had been a model for the proposed marihuana controls.[24] After explaining that "all legitimate handlers of marihuana" would be subject to the occupational tax and registration provisions, the committees continued:[25]

> In order to raise additional revenue and to prevent transfers to persons who would use marihuana for undesirable purposes, a transfer tax is imposed upon each transfer of marihuana. Upon transfers to registered persons, this tax is $1 per ounce, while, upon transfers to nonregistered persons, who under ordinary circumstances will be the illicit users of marihuana, a heavy tax of $100 per ounce is imposed. * * *
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> Thus, the bill is designed, through the occupational tax, to publicize legitimate dealings in marihuana, and through the $100 transfer tax to prevent the drug from coming into the hands of those who will put it to illicit uses.

This language underscores the dual objectives sought to be achieved: "to employ the Federal taxing power to raise revenue from the [legitimate] marihuana drug traffic and to discourage the widespread

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[24] H. Rep. p. 2; S. Rep. p. 3.

[25] *Ibid.*

use of the drug by smokers and drug addicts." [26] Congress thus sought to limit marihuana transactions, as with the narcotics traffic under the Harrison Act, to registered persons. And it intended to accomplish this result by imposing a transfer tax on acquisitions by those who are not registered in an amount foreseen to be completely "prohibitive." [27] Why Congress chose to enact the proscription in the form of a prohibitive tax instead of using the same language as used in the Harrison Narcotic Act (see n. 15, *supra*) is not entirely clear. However, as reflected by the House Committee Report,[28] Congress was at that time concerned about the reach of its constitutional powers. It thus chose to frame the proscription in terms of a regulatory tax as it had done in the National Firearms Act which had been, that very same year, upheld against constitutional challenge in *Sonzinsky* v. *United States*, 300 U.S. 506.[29] Moreover, when the Marihuana Tax Act was enacted in 1937, not all of the states had meaningful laws directed towards the illicit handling

[26] H. Rep. p. 1; see S. Rep. p. 2.

[27] *United States* v. *Sanchez*, *supra*, 340 U.S. at 44. This belief proved to be well founded. The Internal Revenue Service has advised us that they have no knowledge of any applications to prepay the $100 per ounce tax. See, also, *Pena* v. *United States*, 386 F. 2d 181, 182 (C.A. 5).

[28] H. Rep. pp. 2–3.

[29] *Hearings on H.R. 6385 before the House Comm. on Ways* and Means, 75th Cong., 1st Sess., pp. 9, 14 (1937), quoted at Petitioner's Br. p. 12, n.5. In holding certain features of the National Firearms Act unenforceable criminally in the face of the privilege against self-incrimination, this Court in *Haynes*, *supra*, expressly reaffirmed what had been decided in *Sonzinsky* about the validity of the use of the tax power for regulatory purposes. 390 U.S. at 98.

of marihuana. See Bureau of Narcotics, *Report on the Traffic in Opium and other Dangerous Drugs* (for the year ended December 31, 1936) p. 58. It was probably in deference to the states that Congress refrained from phrasing the provisions as constituting a direct and categorical ban, preferring instead to establish the substantive policy and administrative machinery for that result. As this Court has recognized, the "severe burden" imposed by the $100 per ounce tax on transfers to non-registrants "implements the congressional purpose of restricting traffic in marihuana to accepted industrial and medicinal channels." *United States* v. *Sanchez, supra,* 340 U.S. at 44; cf. *United States* v. *Doremus,* 249 U.S. 86, 94.

The interpretation of the Act followed consistently for thirty years by the two agencies administering it promotes this expressed legislative goal. Under settled principles, this long-standing construction is entitled to authoritative weight. *Udall* v. *Tallman,* 380 U.S. 1, 16; *United States* v. *Fisher,* 853 F. 2d 396, 397–398 (C.A. 5). It has the added virtue of avoiding serious problems of self-incrimination under *Marchetti, Grosso,* and *Haynes.* See 26 U.S.C. 4773, 7237(e). In urging acceptance of the administrative construction, we follow the salutary rule that "a statute should be interpreted, if fairly possible, in such a way as to free it from not insubstantial constitutional doubts." See *Lynch* v. *Overholser,* 369 U.S. 705, 711; *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 348 (concurring opinion); *Crowell* v. *Benson,* 285 U.S. 22, 62; see, also, *Haynes* v. *United States, supra,* 390 U.S. at 92.

C. SO CONSTRUED, THE MARIHUANA TAX ACT DOES NOT CONTEMPLATE, MUCH LESS COMPEL, SELF-INCRIMINATION [30]

The purpose and effect of the gambling and firearms legislation considered in *Marchetti, Grosso,* and *Haynes,* was noted by this Court to be two-fold: (1) the raising of public revenues; and (2) the securing of information which would assist state and federal authorities in prosecutions for violations of state and federal laws relating to gambling and possession of firearms. This Court found the latter disclosure provisions to be directed at those "inherently suspect of criminal activities." *Marchetti* v. *United States, supra,* 390 U.S. at 47; see, also, *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 79. The Marihuana Tax Act, however, differs significantly in purpose and effect from that legislation. As we have seen, *supra,* pp. 13–14, 20–21, in passing this Act, Congress expressly confined its revenue *and* disclosure objectives to what it termed the "legitimate" commerce in marihuana.[31] The prohibitive tax on transfers to non-registrants was intended to end the availability of marihuana for illegal use, and it was never contemplated that persons who sought marihuana for *illicit* purposes would—as they apparently never

[30] Petitioner apparently concedes this proposition (Br. 12–15).

[31] The court below in rejecting petitioner's reliance on *Marchetti, Grosso,* and *Haynes,* apparently relied on a different aspect of this distinction than we do. The court pointed out, accurately in light of the congressional explanation of the Act and its administration, and in light of the provisions in force in all states under the Uniform Act for lawful handling of marihuana, that the Act's disclosure provisions are *not* directed at a class inherently suspect of criminal activity.

have come forward to register or seek order forms by prepaying the transfer tax.

It was not the purpose of Congress in enacting the Marihuana Tax Act to compel an individual such as petitioner "to provide information which would readily incriminate him * * *." *Grosso* v. *United States*, *supra*, 390 U.S. at 66–67. Petitioner's true complaint is not that he must incriminate himself in order to obtain marihuana legally, but rather, that he cannot legally obtain it at all. In petitioner's case "'literal and full compliance' with all the statutory requirements" (*Grosso*, 390 U.S. at 65) compelled him, not to incriminate himself, but to refrain from handling marihuana. Since, as petitioner well knew, it would have been pointless for him to apply for an order form, it is clear that his claim that the information required to be set forth on such a form could be used to prosecute him for future violations of state laws raises only "imaginary * * * hazards of incrimination" (*Marchetti*, 390 U.S. at 53) which cannot relieve him of criminal liability.

Moreover, petitioner cannot reasonably contend that he ran a serious risk of incriminating himself had he applied for an order form or attempted to pay the tax. Any speculation that such a vain attempt might have been communicated to local law enforcement officers cannot, in light of petitioner's own testimony and the procedures of the Internal Revenue Service, be held to support a claim that petitioner was faced with a "real and appreciable" risk of self-incrimination (*Marchetti*, 390 U.S. at 48). Petitioner made it quite clear in his own testimony that—because of his

awareness that he would not have been given an order form, and because of his religious beliefs—he would not have attempted to have obtained the order form and tendered the tax (App. 87). Moreover, as we have stated above, there are no statutes, regulations, or operating procedures which would have required or authorized the district director to disclose such a hypothetical attempt to enforcement officers.

In sum, petitioner knew that the Marihuana Tax Act does not compel, or even allow, incrimination, but simply prohibits acquisitions of marihuana by non-registered persons. Despite this statutory plan, and his apparent understanding of it, petitioner chose to acquire and transport marihuana. He was not convicted for failing to produce incriminatory information, but for deliberately handling marihuana in violation of the law. That conviction does not impinge upon his privilege against self-incrimination.

D. PETITIONER'S OTHER CHALLENGES TO THE ACT ARE INSUBSTANTIAL

Although the relevant question in the petition for a writ of certiorari and this Court's limited grant of the writ raised only the claim that the Marihuana Tax Act violated petitioner's privilege against self-incrimination, petitioner in his opening brief has sought to urge additional attacks on the statute. Even if we assume these contentions are properly before the Court, they are insubstantial and unavailing.

1. *The fact that the government will not accept pre-payment of the transfer tax from an unregistered person does not preclude indictment and conviction for having acquired and transported marihuana with-*

out having paid the tax. As we have shown above, Congress did not expect and the Internal Revenue Service does not permit pre-payment of the $100 per ounce transfer tax by persons who are not registered. The Marihuana Tax Act was, as we have seen, intended to raise revenue from the legitimate market for marihuana. In aid of this revenue-producing aim, the Act prohibits the acquisition and transportation of marihuana by those who would be most likely to introduce the drug into the illicit channels and create a "black market" in the drug where assessment of the tax would be extremely difficult. This Court has already sustained the permissibility of the type of regulatory scheme here presented.

Under its plenary tax and commerce powers, Congress may place preconditions on the sale or purchase of a regulated commodity. See *United States* v. *Wong Sing*, 260 U.S. 18, 21; *cf. Arrizon* v. *United States*, 224 F. Supp. 27 (S.D. Calif.). The transfer tax and order form provisions of the Marihuana Tax Act are such preconditions. There is no fundamental unfairness—and hence no violation of due process—in establishing a class of individuals who cannot meet or satisfy the preconditions and then punishing them criminally for engaging in the regulated activity without the necessary authority. Congress may constitutionally distinguish between persons who are allowed to deal in a regulated commodity and those who are not, in order "to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue" and "to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandes-

tinely without paying the tax imposed by federal law." *United States* v. *Doremus*, 249 U.S. 86, 94; see, also, *Nigro* v. *United States*, 276 U.S. 332.

The issue is phrased somewhat inaccurately in petitioner's brief, for he has not been convicted for failing to pay a tax which he would not have been allowed to pay; we recognize that the government may not impale a citizen on the horns of such a dilemma. But in this case, the proscribed conduct for which petitioner has been convicted is *transporting marihuana* without having paid the transfer tax. His ineligibility to pre-pay the tax does not excuse his commission of independently forbidden acts. In *Webb* v. *United States*, 249 U.S. 96, this Court was confronted with an argument similar to that petitioner here suggests. The Court nevertheless held that Congress could constitutionally punish the transfer of narcotics to a person who had no order blank for the drugs, even though that person could not "obtain an order blank because not of the class to which such blanks are allowed to be issued." 249 U.S. at 99.[22]

In *Nigro* v. *United States*, *supra*, 276 U.S. at 351–354, the Court rejected another argument similar to that advanced by petitioner. There the question was whether it was within the power of Congress to make it a federal crime to deal in narcotics without using the order form, while making it impossible for un-

[22] Compare *Browning* v. *United States*, 366 F. 2d 420, 422, where the Ninth Circuit rejected an argument that because it was impossible to pay the marihuana transfer tax, an individual could not be punished for violation of the order form limitations of the statute.

registered persons to obtain such a form. Since the order form requirement tends to keep transactions in regulated drugs aboveboard and to confine such transactions to registered dealers readily amenable to tax collection, insistence on order forms, even while denying them to certain classes of individuals, is valid as "genuinely calculated to sustain the revenue features." *Id.* at 354. *Accord, United States* v. *Doremus, supra,* 249 U.S. at 93–94.

In substance and effect, then, the Marihuana Tax Act operates like any other statute regulating eligibility for carrying on a trade or profession. Certainly no one charged, for instance, with practicing law or medicine without a license, or operating a trucking company without a certificate of public convenience and necessity, could be heard to raise as a defense that it would be fundamentally unfair to prosecute him because his lack of qualification for the calling made it *impossible* for him to obtain the license or certificate. Neither can petitioner complain because he is being subjected to the ordinary consequences of handling marihuana without having paid the transfer tax and obtained an order form. Once he proceeded to engage in activities that only those who can satisfy the prerequisites of the statute may perform, he exposed himself to punishment. Even though he was not within the class eligible to comply with the Act's criteria, he had no privilege to go ahead and obtain and transport marihuana.[23]

[23] The analogy to licensing statutes is, we believe, apt. The order form which is issued upon payment of the tax does perform the function of a license. Thus, in *Nigro* v. *United*

There is likewise no substance to petitioner's contention (Br. 13), that under this construction of the Act, the indictment alleging that he was a transferee "required to pay the transfer tax imposed by the Internal Revenue Code" was defective. The offense specified by the statute is, indeed, transportation of non-tax-paid marihuana by "any person who is a transferee required to pay the transfer tax * * *." 26 U.S.C. 4744(a). The government is not arguing, however, and the agencies have never found, that unregistrable individuals like petitioner are not subject to the transfer tax; our position is only that such persons cannot *pre*-pay the tax and obtain an order form to sanction the transaction. But if the transfer is consummated nevertheless, it is a taxable transaction for which the transferee is civilly (as well as criminally) liable.[34] Similarly, for example, it is illegal to embezzle the property of another. But if a person does embezzle, the proceeds of his actions are taxable income. *James* v. *United States*, 366 U.S. 213.

2. *There is no unfairness in presuming that a transfer of marihuana was not made in pursuance of an order form if the transferee cannot, upon demand, produce a copy of that form.* Petitioner's suggestion

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States, *supra* 276 U.S. at 345, the Court viewed the objective of the order form provisions of the Harrison Act as effecting "a kind of registration of lawful purchasers, in addition to one of lawful sellers * * *." Chief Justice Taft, for the Court, continued: "the order form is not a mere record of a past transaction—it is a certificate of legality of the transaction being carried on * * *." 276 U.S. at 351.

[34] Compare *United States* v. *Covington*, Cr. No. 9041, S.D. of Ohio, probable jurisdiction noted, October 21, 1968, No. 366, this Term.

here is that since the government would refuse to issue an order form to a person who is not registered, the statutory inference (based on proof of possession of marihuana and failure to produce a copy of an order form on demand, 26 U.S.C. 4744(a)) is basically unfair.[35] In the circumstances, however, petitioner is in no position to complain; he himself admitted that the transfer was made to him without his acquisition of an order form (App. 86-87, 92). Moreover, this presumption is essentially indistinguishable from the conclusion that a person who is stopped while driving an automobile and is unable to produce an operator's license did in fact operate the automobile without being duly licensed. It would certainly be no defense that he had been refused a license, or could not have obtained one, because of some physical defect or other infirmity.

3. *The trial court did not erroneously fail to instruct the jury that non-payment of the transfer tax was immaterial to the government's case.* Although, as discussed above, Congress, by imposing what it correctly believed to be a prohibitory tax, intended to curb a course of conduct, this does not suggest that non-payment of the tax is immaterial. Indeed, the statuory language specifically makes such failure an element of the crime charged. The trial court therefore properly charged that the jury would have to find such failure in order to convict.

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[35] Petitioner does not, of course, suggest that the inference is irrational. See *Vick* v. *United States*, 304 F. 2d 379, 380 (C.A.D.C.).

4. *Petitioner was given fair notice by the statute as to the elements of criminal liability.* As mentioned above, petitioner testified that he was fully aware that the government would not issue order forms to those who are not duly registered. He also knew that the law prohibits transfers in the absence of the order forms and payment of the tax (App. 86–87). In these circumstances, petitioner cannot fairly argue that he was not adequately forewarned that his conduct would constitute a violation of the law.

Insofar as petitioner claims standing to raise this objection on behalf of "persons similarly situated" (Brief, p. 14), his argument meets with no greater success. The clearly defined elements of the crime of which he stands convicted—being a transferee of marihuana required to pay the transfer tax, who obtained the marihuana without having done so and then concealed and transported it—are unaffected by the question of whether, had he or some other member of the class of illicit users tried to pre-pay the tax, the tax would have been accepted and an order form issued. The statute clearly gives notice that transportation of non-tax-paid marihuana is prohibited.

II. IN THE CIRCUMSTANCES, THE TRIAL COURT DID NOT ERR IN CHARGING, PURSUANT TO 21 U.S.C. 176a, THAT THE JURY WAS AUTHORIZED TO CONVICT UPON A FINDING OF UNEXPLAINED POSSESSION OF MARIHUANA IN THE UNITED STATES

A. INTRODUCTION

Count two charged petitioner with transporting and concealing marihuana with knowledge that it had been imported contrary to law. The trial court submitted

this aspect of the case to the jury on two alternative theories. The first—the "South-North" theory—was based on petitioner's own testimony, as set forth above, that he had purchased the marihuana in New York, and transported it to the Mexican customs station. According to petitioner, after having been denied entry into the interior of Mexico, he drove back across the border, and attempted to drive through customs without declaration of the marihuana which he then knew was in his daughter's possession (App. 86, 91–92).

The second theory—the "North-South" theory—was based partly on petitioner's testimony, and partly on the statutory inference allowed by 21 U.S.C. 176a. Again referring to petitioner's own testimony to the effect that he had purchased the marihuana in New York and had transported it into and through the Southern District of Texas, the trial court instructed the jury that they could find unlawful importation, and knowledge thereof, from the fact of petitioner's possession of the marihuana on his trip to Mexico (App. 97–98, 102–104).[36] No objection was made with regard to the use of the statutory inference.[37]

[36] Under this alternative theory, it would have made no difference that petitioner further testified that he had transported the marihuana into the United States on his return from Mexico.

[37] Petitioner objected to the trial court's failure to advise the jury of the mandatory minimum sentence provided for in 21 U.S.C. 176a. He also asserted that it was error for the trial court to have submitted the "North-South" theory to the jury, not because of the irrationality of the inference, but because the government had not asserted that theory during trial (R. 612, 613–614).

B. GIVEN HIS OWN UNDISPUTED TESTIMONY SHOWING FACTS WHICH WARRANTED CONVICTION FOR TRANSPORTING AND CONCEALING UNLAWFULLY IMPORTED MARIHUANA, AND HIS FAILURE TO OBJECT TO THE ALTERNATIVE THEORY BASED ON THE STATUTORY INFERENCE, PETITIONER CANNOT NOW COMPLAIN ABOUT THE INCLUSION OF THE CHARGE ON THAT ALTERNATIVE THEORY

Even if the inferences of unlawful importation and knowledge thereof could not be sustained, petitioner was not prejudiced by the inclusion of an instruction on that inference. Relying primarily on his defense that, because of his religious beliefs, he was privileged to possess, use, and transport marihuana with impunity, petitioner fully admitted each and every fact necessary to establish all elements of the offense: unlawful importation, knowledge, and concealment and transportation of the marihuana after it arrived in the United States. Accepting as true petitioner's testimony that the marihuana was originally obtained in New York,[28] unlawful importation was nevertheless shown by the evidence that he transported the marihuana back across the border after having been denied entry into the interior of Mexico. Under 26 U.S.C. 4751, marihuana may not legally be brought into the United States except by duly licensed importers—a class to which petitioner obviously does not belong. The entry of the drug from Mexico was therefore "contrary to law" within the

[28] The trial court apparently credited petitioner's testimony to that effect, since it refused to allow a smuggling charge (Count 1) to go to the jury, on the assumption that an article taken out of the United States could not be "*smuggled*" back into this country. *Cf. United States* v. *Claybourn*, 180 F. Supp. 448, 451–452 (S.D. Calif.).

meaning of 21 U.S.C. 176a. Cf. *Roseman* v. *United States*, 364 F. 2d 18, 23–24 (C.A. 9), certiorari denied *sub nom. Copley* v. *United States*, 386 U.S. 918; *United States* v. *Claybourn*, 180 F. Supp. 448, 452 (S.D. Calif.).

In these circumstances, if petitioner had any objection to the alternative "North-South" theory because of its reliance upon the statutory inferences, instead of urging as his sole objection the contention that the government had not previously developed this theory he should have made this objection known to the trial judge so that the judge could have considered whether mention of the inference should have been retained. See Rule 30, F.R. Crim. P. What was said in *United States* v. *Roth*, 237 F. 2d 796, 800 (C.A. 2), affirmed, 354 U.S. 476, is equally applicable here:

> Now he is not in a position to press this objection. Here we have more than a waiver by failure to object. We have in fact an instance of submission of issues to the jury on more than a single ground which might have been separated had the parties so desired. Since no requests for separate verdicts or for withdrawa' of this issue was made, the conviction must stand as supported by the clear evidence * * *.

See also, *Doan* v. *United States*, 202 F. 2d 674, 679 (C.A. 9); *United States* v. *Goldstein*, 168 F. 2d 666, 671–672 (C.A. 2); *United States* v. *Smith*, 112 F. 2d 83, 86 (C.A. 2). Having failed to move for withdrawal of the "North-South" theory on the ground now pre-

sented, petitioner is in no position to complain. The impossibility of ascertaining which approach the jury took in finding him guilty should, in this context, be chargeable to petitioner. This disposition is especially appropriate because his own undisputed testimony sufficed to support conviction under the "South-North" theory, without resort to the statutory inference.

C. THERE IS A RATIONAL CONNECTION BETWEEN THE FACT OF POSSESSION OF MARIHUANA IN THE UNITED STATES AND THE INFERENCES THAT THE MARIHUANA WAS IMPORTED CONTRARY TO LAW AND THAT THE PERSON IN POSSESSION WAS AWARE OF SUCH UNLAWFUL IMPORTATION

In any event, the inference permitted by 21 U.S.C. 176a is constitutional and thus the instruction that proof of possession would authorize return of a guilty verdict was proper. This Court has consistently held that the constitutionality of a statutory inference depends "upon the rationality of the connection between the fact proved and the ultimate fact presumed. *Tot* v. *United States*, 319 U.S. 463, 466." *United States* v. *Gainey*, 380 U.S. 63, 66–67.[39] Stated otherwise, the test is whether Congress, in light of the knowledge and experience available, acted arbitrarily in concluding that a jury could rationally derive from the facts giving rise to the presumption an inference of the

[39] See also, *Mobile, J. & K. C.R.R.* v. *Turnipseed*, 219 U.S. 35, 43; *Luria* v. *United States*, 231 U.S. 9, 25–26; *Hawes* v. *Georgia*, 258 U.S. 1, 4; *Yee Hem* v. *United States*, 268 U.S. 178, 184; *Casey* v. *United States*, 276 U.S. 413, 418.

fact to be presumed. As this Court recognized in *Gainey, supra*, 380 U.S. at 67:

> The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within the specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.

We submit that, in light of the knowledge before Congress when it enacted the statutory inference, as well as in light of present day experience, it is reasonable to authorize a jury to infer from the unexplained possession of marihuana that the marihuana had in fact been imported contrary to law and that the defendant knew of this. In so stating, we do not suggest that no marihuana is grown in the United States, or that no domestic marihuana reaches the illicit market. We do suggest, however, that the best available evidence adequately supports the Congressional judgment that the great majority of marihuana marketed illicitly in the United States originates from foreign sources and is unlawfully imported.

1. Prior to 1956, prosecutions for the illegal importation of marihuana were brought under the general anti-smuggling statute (18 U.S.C. 545). As part of the Narcotic Control Act of 1956, however, the smuggling and unlawful importation of marihuana were made separate offenses, with increased mandatory minimum sentences.[40] When considering this pro-

[40] S. Rep. No. 1997, 84th Cong., 2d Sess., p. 7 (1956); H. Rep. No. 2388, 84th Cong., 2d Sess., pp. 3, 6 (1956); H. Conf. Rep. No. 2546, 84th Cong., 2d Sess., p. 14 (1956).

posed legislation, Congress was, of course, aware that marihuana could be grown domestically. Speaking to that fact, however, Harry J. Anslinger, who at the time had been Commissioner of Narcotics for over twenty-five years, testified that the illicit production of domestic marihuana had been suppressed satisfactorily; that domestic marihuana was not used in the illicit market because of the relatively short growing season in the United States and the reduced potency of the alkaloid content; and that 90 percent of all marihuana seized in illicit traffic had been smuggled from Mexico.[41] On the basis of this and other similar testimony throughout the voluminous hearings in which state and local law enforcement officers also stated that most illicit marihuana is of Mexican origin, plus evidence dealing with the quantity of seizures at ports and borders, it was wholly reasonable for Congress to allow juries to "accord to the evidence [of possession], if unexplained, its natural probative force." *United States* v. *Gainey, supra,* 380 U.S. at 71. The creation of a statutory inference on this question merely dispenses with the need for cumbersome evidence at each trial of what Congress justifiably concluded could reliably be assumed.

Notwithstanding repeated observations that marihuana can be and is grown in the United States, the courts of appeals have accorded great weight to the congressional finding and have consistently held the

[41] *Hearings on Illicit Narcotics Traffic before the Subcomm. on Improvements of the Federal Criminal Code of the Senate Comm. on the Judiciary,* 84th Cong. 1st Sess., Pt. I, pp. 17–18 (1955).

statutory inference constitutional. *Caudillo* v. *United States*, 253 F. 2d 513 (C.A. 9), certiorari denied *sub nom. Romero* v. *United States*, 357 U.S. 931; *Butler* v. *United States*, 273 F. 2d 436 (C.A. 9); *Claypole* v. *United States*, 280 F. 2d 768 (C.A. 9); *William* v. *United States*, 290 F. 2d 451 (C.A. 9); *Rossetti* v. *United States*, 315 F. 2d 86 (C.A. 9), certiorari denied, 375 U.S. 814; *Costello* v. *United States*, 324 F. 2d 260 (C.A. 9), certiorari denied, 376 U.S. 930; *United States* v. *Soto*, 256 F. 2d 729 (C.A. 7); *United States* v. *Taylor*, 266 F. 2d 310 (C.A. 7), certiorari denied, 374 U.S. 856; *Borne* v. *United States*, 332 F. 2d 565 (C.A. 5); *United States* v. *Gibson*, 310 F. 2d 79 (C.A. 2).

We are aware of no new evidence which would detract from the authoritative findings of Congress. Indeed, additional empirical evidence presently available actually corroborates the findings underlying this inference. Every American jurisdiction still—as in 1956—prohibits the unlicensed growing of marihuana.[42] In tightly enforcing this ban, state and local authorities have eradicated some 11,393 acres of volunteer growth during the years 1962 through 1967.[43] Those

[42] All jurisdictions have adopted legislation patterned after the Uniform Narcotic Drug Act, Section 3 of that Act prohibits the growing of marihuana except under license.

[43] Figures are from the following sources:

1962—Bureau of Narcotics, *Report on the Traffic in Opium and Other Dangerous Drugs* (for the year ended December 31, 1962), p. 18.

1963—*Id.* (for the year ended December 31, 1963), p. 17.

1964—*Id.* (for the year ended December 31, 1964), p. 19.

1965—*Id.* (for the year ended December 31, 1965), p. 17.

1966—*Report of the Government of the United States of America for the Calendar Year 1966 on the Work-*

who have studied marihuana and the marihuana users have found that, in light of the unsatisfactory potency of the domestic plant, explained to Congress by Commissioner Anslinger, the typical marihuana user still prefers the Mexican variety to that which can be grown domestically.[44] Only last year, the President's Crime Commission expressed the same conclusion, finding that: "Most of the marihuana that reaches American users comes from Mexico."[45]

The relevant statistics demonstrate the soundness of this conclusion. The total of marihuana seized at the ports and borders—which law enforcement authorities estimate constitutes 10 per cent of the total actually smuggled into the United States (see App. 92)—has shown significant increase in the past several years. While only 1009 kilograms were seized in 1962,[46] 8,353 kilograms were seized in 1966,[47] and

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ing of the International Treaties on Narcotic Drugs, p. 10 (1966).

1967—*Id.* (for the Calendar Year 1967), p. 9 (1967).

The Bureau of Narcotics has advised us that one acre will yield between 850 and 2000 pounds of marihuana.

[44] See *e.g.*, Rosewear, *Pot: A Handbook of Marihuana*, p. 32 (1967); Simmons, *Marihuana, Myth and Realities*, pp. 73–77 (1967); *Keeping on the Grass*, Newsweek, July 24, 1967, p. 48; Buckwalter, *Merchants of Misery*, p. 13 (1956).

[45] President's Commission on Law Enforcement and Administration of Justice, *Commission Report: The Challenge of Crime in a Free Society*, p. 213 (1967), *id.*, *Task Force Report: Narcotics and Drug Abuse*, p. 3 (1967).

[46] Bureau of Narcotics, *Report on the Traffic in Opium and Other Dangerous Drugs* (for the year ended December 31, 1962), p. 66.

[47] *Id.* (for the year ended December 31, 1966), p. 45.

23,426 kilograms in 1967.[48] Equally significant is the relationship between the marihuana seized at ports and borders and that (which may or may not be of foreign origin) seized in internal traffic. Over the past six years (1962–1967), 79 per cent of all marihuana seized by federal authorities was seized in attempted smuggling through ports and borders into the United States and only 21 per cent was seized in internal traffic.[49] While we believe that this almost four-to-one ratio is sufficient to sustain the statutory inference of illegal importation, we point out in addition that it is likely that much of the marihuana seized internally is not "home grown." On many occasions, customs officials will let marihuana of foreign origin pass through the border in order to ascertain its intended recipient, and when the recipient is arrested, the seizure will be recorded as an internal one. In addition, a great portion of the marihuana seized internally is conclusively shown to have originated from foreign sources, by independent evidence—for example, when wrapped in Mexican newspaper. Moreover, the extensive controls against growing imposed by

[48] *Id.* (for the year ended December 31, 1967), p. 43.

[49] Figures for the various mentioned years are found at the following sources:

Year	Seizures at Borders	Internal Seizures	Source
1962	1,009.48 Kg.	354.10 Kg.	Bureau of Narcotics, *Report on the Traffic in Opium and other Dangerous Drugs* (for the year ended December 31, 1962), p. 66.
1963	1,588.32 Kg.	1336.21 Kg.	*Id.* (for the year ended December 31, 1963), p. 78.
1964	3,589.28 Kg.	672.22 Kg.	*Id.* (for the year ended December 31, 1964), p. 84.
1965	4,144.51 Kg.	1492.73 Kg.	*Id.* (for the year ended December 31, 1965), p. 51.
1966	8,333.53 Kg.	2426.59 Kg.	*Id.* (for the year ended December 31, 1966), p. 45.
1967	23,426.42 Kg.	4488.51 Kg.	*Id.* (for the year ended December 31, 1967), p. 43.

state authorities and the eradication programs carried out thereunder, and the fact that the typical marihuana user still clamors for the Mexican variety—often referred to as "Acapulco Gold"—which gives the better "high" for the price, also support the conclusion that marihuana seized within the United States has been imported.

Given all these factors, we suggest that Congress was fully warranted in concluding that there was a rational connection between the fact of possession and the inference of foreign origin. In sum, the statutory inference here challenged does no more than accord common knowledge and experience "its natural probative force." *United States* v. *Gainey, supra,* 380 U.S. at 71.

2. If we are correct that it is reasonable to infer illegal importation from the fact of possession of marihuana, then it necessarily follows that unexplained possession similarly permits an inference that *the purchaser had knowledge* that the marihuana was imported contrary to law. Referring to the analogous inference dealing with opium (21 U.S.C. 174), this Court observed in *Yee Hem* v. *United States,* 268 U.S. 178, 184:

> * * * Nor do we think the further provision, that possession of such opium in the absence of a satisfactory explanation shall create a presumption of guilt, is "so unreasonable as to be a purely arbitrary mandate." By universal sentiment, and settled policy as evidenced by state and local legislation for more than half a century, opium is an illegitimate

> commodity, the use of which, except as a medicinal agent, is rigidly condemned. Legitimate possession, unless for medicinal use, is so highly improbable that to say to any person who obtains the outlawed commodity, "since you are bound to know that it cannot be brought into this country at all, except under regulation for medicinal use, you must at your peril ascertain and be prepared to show the facts and circumstances which rebut, or tend to rebut, the natural inference of unlawful importation, or your knowledge of it," is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress.

So too with marihuana. As shown above, by universal sentiment and policy, the domestic growth of marihuana is rigidly condemned by federal, state, and local legislation, and importation is limited to that for legitimate (non-smoking) purposes. The statute thus cautions the prospective purchaser to "ascertain and be prepared to show facts and circumstances which rebut" the natural and logical inference of importation contrary to law. In view of the high probability that marihuana purchased in the illicit market is of foreign origin and is illegally imported, and the fact that the purchaser is generally the sole repository of the facts showing such origin, it is not unreasonable to permit the jury to assume knowledge of that fact, absent a satis actory explanation.[50]

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[50] Although not assigned in his petition for a writ of certiorari, petitioner now contends (Br. 23) that it is irrational to infer, from the fact of possession, that petitioner transported and concealed the marihuana "with intent to defraud." The

D. PETITIONER'S OTHER CONTENTIONS ARE INSUBSTANTIAL

Petitioner's remaining claims of error relate to the trial court's instructions but are not "fairly comprised" within the questions presented by his petition or the order granting certiorari limited to specified questions. 392 U.S. 903. They are thus not properly before the Court. See Rule 23(1)(c).[51] They are, in any event, devoid of merit.

1. In charging the jury with respect to the statutory inference allowed by Section 176a, the trial court read to the jury the statutory provision that (App. 97–98):

> Whenever on trial for a violation of this subsection [176a], the defendant is shown to have had marihuana in his possession, such possession shall be deemed sufficient evidence as to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

The court then explained (App. 97–98):

> What this means, of course, is this:
>
> If the defendant be shown to have had the marihuana in his possession in the United

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government, however, did not purport to rely on the statutory inference to prove this element. The government's evidence clearly showed—and petitioner fully admitted—that the marihuana was, with his knowledge, concealed in the automobile, and that he attempted to pass through customs without declaring it. The undisputed evidence thus showed that he transported the marihuana with the requisite intent.

[51] In his petition for a writ of certiorari, petitioner did suggest that the presumption created by 21 U.S.C. 176a violated his privilege against self-incrimination. The contention is unsound, see *Yee Hem* v. *United States*, 268 U.S. 178; cf. *United States* v. *Gainey*, 380 U.S. 63, and we assume that by failing to brief the point petitioner has abandoned it or concluded that it is outside the limitations as to the grant of certiorari.

> States, such possession shall be deemed sufficient evidence to authorize conviction unless he explains his possession to the satisfaction of the jury. That means, unless he proves to your satisfaction that it was a *lawful and legitimate* possession of the marihuana which he had. (Emphasis added.)

Petitioner contends that by instructing the jury that a "lawful and legitimate" possession would negate the effect of the statutory inference, the trial court erroneously removed the elements of unlawful importation and knowledge thereof from the jury's consideration. We think it clear, however, that the trial court, in using the terms "lawful" and "legitimate", merely meant that the statutory inference would be negated if petitioner successfully demonstrated, by testimony or otherwise, that the marihuana was imported through legitimate channels, or that he was unaware of the unlawful importation.[52] Although a better explanation might have been used, petitioner did not object to that explanation. See Rule 30, F.R. Crim. P. Elsewhere in his charge, the trial judge made it amply clear that unlawful importation and

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[52] Petitioner asserts (Br. 25) that the trial court then went on to define "legitimate" possession as only that possession which was acquired in compliance with the tax laws of the United States. That explanation of "legitimate", however, was not made with respect to the importation count, but to the count charging petitioner with transporting and concealing non-tax-paid marihuana in violation of 26 U.S.C. 4744(a)(2) (App. 98–99).

knowledge thereof were elements of the crime with which petitioner was charged (See App. 103–104). In these circumstances, there was no plain error affecting substantial rights. See Rule 52(b), F.R. Crim. P.

2. The statutory inference, as applied to petitioner, was not made vague and indefinite because the trial judge did not more fully explain what he meant in charging that the inference authorized conviction "unless the defendant explains his possession to the satisfaction of the jury." It was obvious to all concerned—and petitioner himself sought no further elaboration—that the trial judge was advising the jury that the inference would be overcome if the defendant produced evidence, which they believed, that would show either that the drug was of domestic origin, that it was imported lawfully, or that he was unaware of the origin. In the absence of objection, or a showing of plain error, this belated contention too must be rejected. See Rule 52(b), F.R. Crim. P.

Relying upon his belief in "the fifth freedom"—i.e., "the freedom of a man to pursue his inner goals and to expand his own consciousness" (App. 87–88), petitioner's sole "defense" at trial was that he had both a moral and political right to traffic in and use marihuana in violation of the law. None of the arguments he now falls back upon merits reversal of his convictions any more than his personal conception of his "fifth freedom" sanctioned his knowing transportation of marihuana.

CONCLUSION

The judgment below should be affirmed.
Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

JOHN S. MARTIN, JR.,
PHILIP A. LACOVARA,
Assistants to the Solicitor General.

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

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APPENDIX

26 U.S.C. 4741 provides:

(a) Rate.

There shall be imposed upon all transfer of marihuana which are required by section 4742 to be carried out in pursuance of written order forms taxes at the following rates:

(1) Transfers to special taxpayers.

Upon each transfer to any person who has paid the special tax and registered under sections 4751 to 4753, inclusive, $1 per ounce of marihuana or fraction thereof.

(2) Transfers to others.

Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof.

(b) By whom paid.

Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 4742 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax.

26 U.S.C. 4742 provides in pertinent part:

Order forms.

(a) General requirement.

It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a

written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

* * * * *

(c) Supply.

The Secretary or his delegate shall cause suitable forms to be prepared for the purposes mentioned in this section and shall cause them to be distributed to each internal revenue district for sale. The price at which such forms shall be sold shall be fixed by the Secretary or his delegate, but shall not exceed 2 cents each. Whenever any of such forms are sold, the Secretary or his delegate shall cause the date of sale, the name and address of the proposed vendor, the name and address of the purchaser, and the amount of marihuana order to be plainly written or stamped thereon before delivering the same.

* * * * *

(d) Preservation.

Each such order form sold by the Secretary or his delegate shall be prepared to include an original and two copies, any one of which shall be admissible in evidence as an original. The original and one copy shall be given to the purchaser thereof. The original shall in turn be given by the purchaser thereof to any person who shall, in pursuance thereof, transfer marihuana to him and shall be preserved by such person for a period of 2 years so as to be readily accessible for inspection by an officer or employee mentioned in section 4773. The copy given to the purchaser shall be retained by the purchaser and preserved for a period of 2 years so as to be readily accessible to inspection by any officer or employee mentioned in section 4773. The second copy shall be preserved in the records of the internal revenue district.

* * * * *

26 U.S.C. 4743 provides:

The stamps provided in section 4771(a)(1) for marihuana shall be affixed by the Secretary or his delegate to the original order form.

26 U.S.C 4744 provides in pertinent part:

(a) Persons in general.

It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be persumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

* * * * *

26 U.S.C. 4751 provides:

Imposition of tax.

Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana shall before engaging in any of the above-mentioned activities and thereafter on or before July 1 of each year, pay the following special taxes respectively:

(1) Importers, manufacturers, and compounders.

Importers, manufacturers, and compounders of marihuana, $24 a year;

(2) Producers.

Producers of marihuana (except those included within paragraph (4)), $1 a year, or

fraction thereof, during which they engage in such activity;

(3) Physicians, dentists, veterinary surgeons, and other practioners.

Physicians, dentists, veterinary surgeons, and other practioners who distribute, dispense, give away, administer, or prescribe marihuana to patients upon whom they in the course of their professional practice are in attendance, $1 a year, or fraction thereof, during which they engage in any of such activities.

(4) Persons engaged in research, instruction, or analysis.

Any person not registered as an importer, manufacturer, producer, or compounder who obtains and uses marihuana in a laboratory for the purpose of research, instruction, or analysis, or who produces marihuana for any such purpose, $1 a year, or fraction thereof, during which he engages in such activities;

(5) Persons not otherwise taxed.

Any person who is not a physician, dentist, veterinary surgeon, or other practitioner and who deals in, dispenses, or gives away marihuana, $3 a year; *Provided,* That any person who has registered and paid the special tax as an importer, manufacturer, compounder, or producer, as required by paragraphs (1) and (2), may deal in, dispense, or give away marihuana imported, manufactured, compounded, or produced by him without further payment of the tax imposed by this section;

(6) Millers.

Any person who at a mill manufactures or produces from the plant Cannabis sativa L. any fiber or fiber products, $1 a year, or fraction thereof, during which he engages in such activities.

26 U.S.C. 4752 provides:

(a) Computation of tax.

Where a tax under paragraph (1) or (5) of section 4751 is payable on July 1 of any year it shall be computed for 1 year; where any such tax is payable on any other day it shall be computed proportionately from the first day of the month in which the liability for the tax accrued to the following July 1.

(b) Liability in case of activities in more than one place.

In the event that any person subject to a tax imposed by section 4751 engages in any of the activities enumerated in such section at more than one place, such person shall pay the tax with respect to each such place.

(c) Liability in case of more than one activity by same person at same time.

Except as otherwise provided, whenever more than one of the activities enumerated in section 4751 is carried on by the same person at the same time, such person shall pay the tax for each such activity, according to the respective rates prescribed.

26 U.S.C. 4753 provides in pertinent part:

(a) In general.

Any person subject to the tax imposed by section 4751 shall, upon payment of such tax, register his name or style and his place or places of business with the official in charge of the internal revenue district in which such place or places of business are located.

* * * * *

26 U.S.C. 4771 provides in pertinent part:

§ 4771. Stamps.

(a) Method of payment.

(1) Stamps.

The taxes imposed by sections 4701 and 4741 shall be represented by appropriate stamps, to be provided by the Secretary or his delegate.

* * * * *

26 U.S.C. 4773 provides:

§ 4473. Inspection of returns, order forms, and prescriptions.

The duplicate order forms and the prescriptions, including the written record of oral prescriptions, required to be preserved under the provisions of section 4705 (c)(2) and (e), and and the order forms and copies thereof and the prescriptions and records required to be preserved under the provisions of section 4742, in addition to the statements or returns filed in the office of the official in charge of the internal revenue district under the provisions of sections 4732(b) or 4754, shall be open to inspection by officers and employees of the Treasury Department duly authorized for that purpose, and such officials of any State or Territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the production of marihuana or regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs or marihuana. The Secretary or his delegate is authorized to furnish, upon written request, certified copies of any of the said statements or returns filed in the office of any official in charge of an internal revenue district to any of such officials of any State or Territory or organized municipality therein, or the District of Columbia, or any insular possession of the United States as shall be entitled to inspect the said statements or returns filed in the office of the official in charge of the internal revenue district, upon the payment of a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested. * * *

26 U.S.C. 4775 provides:

§ 4775. List of special taxpayers.

The Secretary or any officer or employee des-

ignated by him is authorized to furnish upon written request, to any person, a certified copy of the names of any or all persons who may be listed in the respective internal revenue districts as special taxpayers under the provisions of sections 4721 to 4726, inclusive, section 4702 (a), section 4751, or section 4752, upon payment of a fee of $1 for each 100 names or fraction thereof in the copy so requested. * * *

26 U.S.C. 6107 provides

§ 6107. List of special taxpayers for public inspection.

In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested may be charged. * * *

26 U.S.C. 7237 provides in pertinent part:

* * * * *

(e) Unlawful disclosure of information on returns and order forms.

Any person who shall disclose the information contained in the statements or returns required under section 4732(b) or 4754(a), in the duplicate order forms required under section

4705(e), or in the order forms or copies thereof referred to in section 4742(d), except—

(1) as expressly provided in section 4773;

(2) for the purpose of enforcing any law of the United States relating to narcotic drugs or marihuana, or

(3) for the purpose of enforcing any law of any State or Territory or the District of Columbia, or any insular possession of the United States, or ordinance of any organized municipality therein, regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs or marihuana,

shall be fined not more than $2,000 or imprisoned not more than 5 years or both. * * *

26 C.F.R. 152.19 provides:

Persons liable.

Liability to payment of special tax and registration attaches to every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana. As to the liability of a person engaged in one or more of the foregoing activities to several taxes see § 152.29.

26 C.F.R. 152.20 provides:

Manner and time of registration.

Every person required to register pursuant to section 4753 shall execute and file, with the district director for the internal revenue district in which he proposes to engage in any activity mentioned in § 152.19, an application for registration on Form 678 and pay the special tax or taxes enumerated in § 152.29. Form 678 shall be executed by new applicants and approved by the district director before the activity is commenced. Renewal applications shall be executed and filed on or before the succeeding July 1, and annually thereafter as long as liability is incurred. Form 678 may be obtained from the district director. For the purpose of

the special tax imposed by section 4751, Form 678 shall be considered a return.

26 C.F.R. 152.22 provides:

Investigation of applicants other than millers.

(a) All new applications on Form 678 shall be referred by the district director to the appropriate narcotic district supervisor for investigation, report, and recommendation. Renewal applications on Form 678 shall also be referred by the district director to the appropriate narcotic district supervisor for investigation, report, and recommendation, if the district director is in doubt as to the applicant's being lawfully entitled to engage in the activity for which he seeks registration. The provisions of this section shall not apply in the case of any application to which the provisions of § 152.21 apply.

(b) In the case of applications which have been so referred, the district director shall not issue a special tax stamp in connection with any registration until information has been submitted to him, by the narcotic district supervisor, that the applicant is properly licensed or otherwise lawfully entitled to engage in the activity in the internal revenue district in which he seeks registration.

(c) All applications for registration that are referred to the narcotic district supervisor shall be returned by him to the district director with recommendation for approval or disappoval and, in case of disapproval, with a statement annexed concerning applicant's lack of license or qualification, to lawfully engage in the activity for which registration is sought. The application together with any required statement shall be returned to the district director within 10 days from date of receipt of the application by the supervisor, unless a longer time shall be required within which to

complete an investigation. In the latter event the district supervisor shall, upon or before the expiration of the said 10-day period, so notify the district director stating the estimated additional time required.

26 C.F.R. 152.23 provides:

Evidence of qualification.

The application of every person shall show that, under the laws of the jurisdiction in which he is operating or proposes to operate, he is legally qualified or lawfully entitled to engage in the activities for which registration is sought.

26 C.F.R. 152.30 provides:

Importers.

Every person who imports marihuana is subject to tax as an importer at the rate of $24 per annum in Class I. A manufacturer or compounder who is also an importer is not thereby required to pay more than one tax.

26 C.F.R. 152.31 provides:

Manufacturers and compounders.

Every person coming within the definition set out in § 152.11(b) is subject to tax as a manufacturer or compounder at the rate of $24 per annum in Class I.

26 C.F.R. 152.32 provides:

Producers.

Every person coming within the definition set out in § 152.11(c) is subject to tax as a producer at the rate of $1 per annum or fraction thereof in Class II.

26 C.F.R. 152.33 provides in pertinent part:

Dealers.

Generally, one who sells, gives away, or dispenses marihuana in any form, is subject to tax as a dealer at the rate of $3 per annum in Class III. * * *

26 C.F.R. 152.34 provides in pertinent part:

Practioners and interdistrict practice.

(a) Physicians, dentists, veterinary surgeons, and other practitioners, including institutions, who prescribe, distribute, dispense, give away, or administer marihuana, and who are entitled to do so under the laws of the jurisdiction in which they practice, are subject to tax at the rate of $1 per annum or fraction thereof in Class IV.

* * * * * *

26 C.F.R. 152.35 provides:

Laboratory use.

Chemists occupying an independent status and not that of employees, in other words, in business for themselves, who, being lawfully entitled so to do, make analyses of marihuana or use marihuana in analyzing other substances in a laboratory, and persons who produce or obtain and use in a laboratory any marihuana for the purpose of research, instruction, or analysis, if not registered as an importer, manufacturer, compounder, or producer, are subject to tax at the rate of $1 per annum or fraction thereof in Class V, provided no marihuana is manufactured or compounded for sale or for removal for consumption or sale.

26 C.F.R. 152.36 provides:

Millers.

Every person who at a mill manufactures or produces from the marihuana plant any fiber or fiber products is subject to tax as a miller at the rate of $1 per annum or fraction thereof in Class VI.

26 C.F.R. 152.61 provides:

Scope of tax.

Except as otherwise provided, each transfer of marihuana to a person within the United States is subject to tax, to be paid in the manner hereinafter indicated. The tax is due

whether the transferor be located within the United States or elsewhere. The tax applies to every transfer, no matter how often the same material may be transferred. It is no basis of exemption that a transferred article was produced from material on the transfer of which tax was paid.

26 C.F.R. 152.62 provides:

Amount of tax.

Where the transfer is to be a taxable person who has duly registered and paid special tax, the transfer tax is at the rate of $1 per ounce or fraction thereof. If the transfer is to be a person who has not registered and paid the special tax under this act, tax at the rate of $100 per ounce or fraction thereof is due.

26 C.F.R. 152.63 provides:

Method of payment.

The tax is paid by attachment of adhesive stamps to order forms as hereinafter shown. Stamps of various denominations are available. Payment for the stamps shall be made when application for the order form is submitted.

26 C. F. R. 152.64 provides:

Affixing and canceling of stamps.

The proper stamp, evidencing the payment of the transfer tax, shall be affixed to the original order form by the district director or his representative, and the person so affixing the stamp shall cancel it by writing or stamping thereon, in ink, his initials, and the day, month, and year, or shall, by cutting with a machine or punch affix his initials and the date as aforesaid, in such manner as to render it unfit for reuse. The cancellation shall not so deface the stamp as to prevent its denomination and genuineness from being readily determined.

26 C.F.R. 152.65 provides:

Reuse of stamps prohibited.

A stamp once affixed to one order form cannot lawfully be removed and affixed to another. As to refunds for amounts paid for stamps, see § 152.124.

26 C.F.R. 152.66 provides:

Written order required for transfer of marihuana.

Except as otherwise provided, every person seeking to obtain marihuana shall make application on Form 679a (Marihuana) to the district director of internal revenue for the district in which the transferee is located for the purchase of an order form. The application shall show (a) the transferee's name, address, and, if registered, the registration number, (b) the name and address of the transferor, and (c) a description, including quantities, of the desired articles or materials to be transferred. The application must be accompanied by a check, cash, or money order in payment of the transfer tax (see § 152.62), plus 2 cents in payment for the order form.

26 C.F.R. 152.67 provides:

Signing of application.

Generally, applications for order forms shall be signed by the same person or persons signing the application for registration (see § 152.25). However, when it is impracticable for the person signing the application for registration to sign the applications for order forms they may be signed by another person, provided a power of attorney authorizing such other person to sign the applications for order forms has previously been filed with and approved by the district director. The power of attorney shall be executed on Form 1315, or a substantially similar form, in the same manner as applications for registration, shall show the signature

of the person thereby authorized to sign applications for order forms, and shall affirm that the signature as shown is his signature.

26 C.F.R. 152.68 provides:

Signatures to be compared.

Upon receipt by the district director of an application for an order form the signature on such application shall be compared with that appearing on the application for registration or in the power of attorney (see § 152.67). Unless the district director is satisfied that the application is authentic it will not be honored.

26 C.F.R. 152.105 provides:

Records open to inspection.

All order forms, duplicate forms, prescription records, returns, and inventories required under the provisions of subchapter A, chapter 39, relating to marihuana, or the regulations in this part to be kept on file shall be kept so that they can be readily inspected.

26 C.F.R. 152.131 provides:

List of taxpayers.

The list of marihuana special-tax payers required by section 6107, shall be kept on Record 10, and may be inspected and copied in the district director's office at such reasonable and proper times as not to interfere with the district director's use of it, or exclude other persons from inspecting it.

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